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~~No. 06-939~~

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, FLORIDA, ILLINOIS, IOWA, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW MEXICO, OHIO, OREGON, RHODE ISLAND, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether federal law preempts a California law that prohibits employers from using state funds "to assist, promote, or deter union organizing," where the federal government has repeatedly attached similar restrictions to the use of federal funds, and where no federal law either prohibits or protects this employer conduct.

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INTEREST OF THE AMICI STATES

Amici States have an interest in ensuring that federal labor law is not construed so broadly as to preempt their traditional authority to ensure that their grants and other expenditures are not diverted to unintended purposes. Here, California — following the lead of the federal government — has chosen to prohibit the use of state funds for influencing employees' decisions regarding unionization. Other States have enacted or are considering enacting similar laws. For example, New York Labor Law § 211-a bars the use of state funds for, among other things, hiring consultants or training supervisors to influence unionization decisions. Regardless of their policy choices on this specific issue, all States have an interest in avoiding an unwarranted finding of preemption that would limit their control over their own funds.

STATEMENT OF THE CASE

Throughout the 1980s and 1990s, the federal government repeatedly conditioned its disbursement of a variety of federal funds on the recipients' agreement that the money would not be used to assist, promote, or deter union organizing. *See, e.g.*, 29 U.S.C. § 2931(b)(7); 42 U.S.C. § 12634(b)(1); 42 U.S.C. § 9839(e); 42 U.S.C. § 1395x(v)(1)(N); *see also infra* Section B (describing federal laws in more detail). By 1999, such restrictions had become so prevalent that, according to the federal General Services Administration, they amounted to a federal policy "to remain neutral with respect to employer-employee labor disputes." *See* Proposed Rule, 64 Fed. Reg. 37,360, 37,360 (July 9, 1999).

In 2000, California adopted the same policy as the federal government, explicitly modeling its statute on several federal laws.[1] *See* AB 1889 Assembly Bill Analysis, *available at* http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1851-1900/ab_1889_cfa_20000907_102420_asm_floor.html. Like the most recent federal enactments, California's law prohibits an employer from using grant or program funds "to assist, promote, or deter union organizing." Cal. Gov't Code §§ 16645.2, 16645.7. An employer may not use such funds "to influence the decision of its employees in this state or those of its subcontractors" regarding (1) whether to "support or oppose a labor organization that represents or seeks to represent those employees" or (2) whether "to become a member of any labor organization."[2] *Id.* § 16645(a).

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1. Soon thereafter, New York and Florida passed similar restrictions on the use of state money to influence unionization decisions. *See* N.Y. Labor Law § 211-a; Fla. Stat. § 400.334. Equivalent bills were introduced in other states around the same time, but activity on them slowed between the time the California law was enjoined in 2002 and the court of appeals' decision in late 2006. *See* John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, State of Cal. Labor 196-98 (U. of Cal. Inst. for Lab. & Emp. 2003)(collecting state proposals as of that date), *available at* http://repositories.cdlib.org/ile/scl2003/ch05/.

2. A separate provision puts similar restrictions on the use of state funds obtained pursuant to a contract worth more than $50,000. *See* Cal. Gov't Code § 16645.4. That provision is not at issue in this case, which concerns only restrictions on the use of money obtained through state grants and programs. For that reason and others, the Second Circuit's concerns about restricting an employer's ability to spend profits it derives from, *e.g.*, contracts for soap, *see Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 102-05 (2d Cir. 2006), are irrelevant here.

Petitioners filed this action, alleging — among other things — that the California law is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* J.A. 125. The District Court granted petitioners' motion for summary judgment and barred the enforcement of the California law. Pet. App. 149a. The court concluded that the NLRA "manifests a congressional intent to encourage free debate on issues dividing labor and management," and that the California law "would prevent this free debate." Pet. App. 146a-147a (quoting *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 (1966)).

A panel of the court of appeals initially affirmed, Pet. App. 114a-139a, and on rehearing again affirmed, this time over a dissent, Pet. App. 58a-113a. But on en banc review, the court of appeals reversed, holding that the California law was not preempted. The en banc court explained that the NLRA "does not *grant* employers speech rights" that could conflict with the restrictions imposed by the California law on the use of state funds. Pet. App. 23a. Nor does the NLRA treat employer speech regarding unionization as a regulation-free zone that would foreclose state law on the subject. Pet. App. 19a-21a.

This Court granted the petition for a writ of certiorari. 128 S. Ct. 645 (2007).

SUMMARY OF ARGUMENT

Petitioners and their amici ask this Court to find that federal labor law guarantees employers a right to spend government money on influencing employees' unionization decisions, and consequently that state laws restricting such use of government money are preempted. But the NLRA guarantees no such right. To the contrary, the federal government routinely places precisely the same restrictions on how employers can use money it hands out. Although repeatedly asserting that federal law actively encourages employers to weigh in on unionization, petitioners and their amici can produce no statutory or regulatory text that embodies such a policy. Rather, any protection of employer speech derives from the First Amendment, which cannot form the basis of NLRA preemption.

By its terms, section 8(c) of the NLRA confers no substantive rights at all, but merely bars the National Labor Relations Board from considering most speech in ruling on alleged unfair labor practices. The provision's legislative history confirms that it was not intended to confer substantive speech rights, but rather to ensure that the Board respected free-speech rights independently protected by the First Amendment by, *inter alia*, precluding the Board from drawing what Congress believed were undue inferences from employer speech. Thus, federal labor law does not grant *any* right of free speech to employers outside the context of unfair labor practice proceedings, let alone one that can overcome a government's interest in controlling its own expenditures.

Moreover, the federal government has repeatedly imposed on employers who receive federal funds precisely the same restrictions that California imposes on employers receiving state funds. Indeed, in the context of joint federal-state funding programs, the federal government has required states to impose the same restrictions. Far from representing a rejection of federal policy, the challenged California law closely parallels the federal government's own practice.

Petitioners' preemption argument thus is built on a faulty premise. No federal policy is contradicted by this California law or any other state law that puts the same limitation on the use of state funds that the federal government puts on the use of federal funds. Therefore, there is no support for invoking either of the two doctrines this Court has developed to govern federal preemption in the labor-relations context. The federal government's own actions are inconsistent with a finding that Congress intended to create a regulation-free zone for employers' use of government funds to influence employees' unionization decisions, so there is no preemption under *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) (*Machinists* preemption). And the NLRA neither prohibits nor protects any conduct covered by the California law, so there is no preemption under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)(*Garmon* preemption).

Relying on their erroneous characterization of federal law, petitioners and their amici warn this Court that upholding California's law would pave the way for

countless state laws that are inconsistent with federal policy and inconsistent with each other. To the contrary, upholding California's law simply would establish the unremarkable principle that federal labor law does not prevent states from imposing the same limits on employers' use of state funding for unionization-influencing activities that the federal government imposes on employers' use of federal funding. The court of appeals' judgment should therefore be affirmed.

ARGUMENT

THE NLRA DOES NOT PREEMPT STATE LAWS RESTRICTING THE USE OF STATE FUNDS TO INFLUENCE UNIONIZATION DECISIONS

The NLRA contains no express provision preempting state laws that touch on labor relations. Because of the presumption against federal preemption of traditional state powers, *see, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), this Court has found the NLRA to preempt state law only when state law actually "conflicts with or otherwise stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law." *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (citation and internal quotation marks omitted); *accord Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). It has detected such a conflict, and accordingly preempted state laws, where those state laws (1) regulate a matter that Congress intended to be left completely unregulated by any government entity, *see Machinists*, 427 U.S. at 140, or (2) regulate conduct that is arguably prohibited or

protected by the NLRA, and thus intrude on the Board's exclusive jurisdiction over alleged unfair labor practices, *see Garmon*, 359 U.S. at 241-45.

To succeed on their preemption claim under either theory, petitioners must show that the California law at issue somehow conflicts with a federal policy embodied in the NLRA. This they cannot do. Not only does the NLRA advance no policy that is in conflict with the state law, making *Garmon* preemption inapplicable, but Congress has repeatedly advanced the same policy embodied in the state law, thus making clear that this is not an area free of all government restrictions, as would be required for *Machinists* preemption. Barring employers from using government money to influence unionization decisions does not frustrate federal policy in any way, and so preemption is inappropriate here.

A. The NLRA Does Not Confer Upon Employers A Free-Speech Right To Spend Government Funds To Influence Unionization Decisions.

The premise of the preemption argument advanced by petitioners and their amici is that the NLRA affirmatively encourages employers to influence their employees' unionization decisions. *See, e.g.*, Br. for United States at 10 (stating that there is a "uniform federal policy of robust union and employer speech during organizing campaigns"). The NLRA creates a statutory right for employers to speak about unionization, they argue, because Congress and the Board have determined that such employer speech is "essential to informed employee decision-making about union organizing." Pet. Br. at 15-16; *see id.* at 30.

Accordingly, they conclude, a state decision not to subsidize such employer speech evinces a policy that is "diametrically opposed to that of the NLRA," *id.* at 30, is "disruptive of the federal scheme," *id.* at 41, and "deters activity protected by federal labor policy," *id.* at 52.

But this supposed broad speech right for employers does not exist. Its claimed source, section 8(c) of the NLRA, simply limits the sort of evidence that the Board can consider in determining what constitutes an unfair labor practice. Section 8(c) contains no rights-granting language and, by its terms, does not even apply outside the context of unfair labor practice proceedings. Nor does its legislative history support a broader interpretation; rather, its history confirms that it was intended as a check on the Board's ability to draw certain inferences, not as a grant of substantive rights. Finally, this Court has never given section 8(c) a more expansive reading, and indeed has rejected a claim that this provision preempts any state-law regulation of speech pertaining to unionization.

1. Statutory Text

By its terms, section 8(c) is a proviso to the NLRA's declaration that it is an unfair labor practice for an employer or labor union to in any way "restrain" or "coerce" employees "in the exercise of the rights guaranteed in section 7," *see* 29 U.S.C. § 158(a)(1), (b)(1), including the rights "to self-organization" and "to form, join, or assist labor organizations," *id.* § 157. Cabining

the Board's discretion in determining what constitutes a forbidden restraint or coercion, section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c).

Thus, nothing in the NLRA affirmatively protects non-coercive employer speech as to unionization or otherwise embodies a congressional policy decision that such employer speech should be affirmatively encouraged. Rather, section 8 of the NLRA merely does not actively discourage such employer speech, in that expression that "contains no threat of reprisal or force or promise of benefit" cannot "constitute or be evidence of an unfair labor provision." Section 8(c) does not even preclude the Board from taking the same speech into account for other purposes, such as evaluating the fairness of an election pursuant to section 9 of the NLRA. *See Matter of Gen. Shoe Corp.*, 77 N.L.R.B. 124, 126-27 & n.10 (1948).

By contrast, the NLRA explicitly protects, with unmistakably rights-granting language, a variety of employees' rights, including employees' "right to self-organization" and to "form, join, or assist labor organizations." 29 U.S.C. § 157. As this language indicates, when Congress intended to create a right

under the NLRA, it did so explicitly. Indeed, in considering precisely this question — the preemptive force of section 8(c) — this Court observed that its plain language does not afford "the express protection" to employers that the NLRA gives, for example, to "union members to criticize the management of their unions and the conduct of their officers." *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 62 n.5 (1966). Moreover, the NLRA includes explicit findings and declarations of policy, *see* 29 U.S.C. § 151, none of which involve encouraging employer speech regarding employees' unionization decisions.

Put differently, if the NLRA did not exist, employers would not lose any speech rights. Section 8(c) does not purport to prohibit all government burdens on employers' speech or other expressive conduct in the way that the First Amendment (through incorporation against the States and municipalities) bars any governmental entity from interfering with protected conduct, *see* Pet. Br. at 24 n.2. It does not even bar the Board from burdening that conduct in other ways, much less prevent any other governmental entity from doing anything. Accordingly, any speech rights employers may enjoy are derived not from the NLRA, but rather from the First Amendment. Nothing in the text and structure of the NLRA even arguably supports the petitioners' claim that there is a strong federal policy of encouraging employer speech regarding unionization, and consequently that state laws limiting the use of state-appropriated funds for that purpose conflict with federal law and must be swept aside.

2. Legislative History

The legislative history of section 8(c) confirms that Congress intended exactly what the provision's plain language would suggest: a restriction on the evidence that the Board can consider in determining whether an unfair labor practice has occurred, not a freestanding right of employers. Congress added this provision to the NLRA as part of the Taft-Hartley Act of 1947 because, despite multiple court rulings that the First Amendment prohibited the Board from punishing employers for non-coercive speech about unionization, the Board continued to use such speech as the basis for finding unfair labor practices.

As originally enacted in 1935, section 8 did not include any limitations on what types of speech, or for that matter any other evidence, the Board could use to find an unfair labor practice. In its very first decision, the Board indicated that it regarded as inherently coercive, and therefore "unfair" within the meaning of the NLRA, "the 'advice' of an employer who has the right to discharge the employee to whom the 'advice' is given." *Matter of Pa. Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 23 (1935), *approved in relevant part*, 91 F.2d 178 (3d Cir. 1937), *rev'd on other grounds*, 303 U.S. 261 (1938). The Second Circuit upheld this construction, finding that "[a]rguments by an employer directed to his employees . . . have a force independent of persuasion," and that accordingly the Board was free to conclude that "[w]hat to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart." *N.L.R.B. v. Federbush Co., Inc.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.).

But the Board's interpretation was twice rejected by this Court, first on statutory and then on constitutional grounds. This Court first reviewed a Board decision that suggested that a company committed unfair labor practices by posting a bulletin that encouraged employees to deal with the company individually rather than forming a union and by holding meetings at which the employer expressed its views. *Matter of Va. Elec. & Power Co.*, 20 N.L.R.B. 911, 920-23 (1940). This Court remanded to provide the Board an opportunity to elaborate on its findings. *N.L.R.B. v. Va. Elec. & Power Co.*, 314 U.S. 469 (1941). It stated that the Board "has a right to look at what the Company has said, as well as what it has done," in determining "whether the whole course of conduct, evidenced in part by the utterances, was aimed at achieving objectives forbidden by the Act." *Id.* at 478-79. However, it concluded, a finding of coercion would be "difficult to sustain" if based solely on the company's statements. *Id.* at 479. It observed, correctly, that the NLRA does not "enjoin[] the employer from expressing its view on labor policies or problems." *Id.* at 477.

Nonetheless, the following year, the Board once again found that an employer had committed an unfair labor practice by urging its employees not to unionize. It interpreted the Act to require "complete neutrality" on the part of employers, and accordingly found an unfair labor practice on the basis of a finding that the employer acted with the purpose "to influence the result of the election." *Matter of Am. Tube Bending Co., Inc.*, 44 N.L.R.B. 121, 129 (1942). The Second Circuit reversed, finding the facts of the case indistinguishable from those of *Virginia Electric*. *See N.L.R.B. v. Am. Tube Bending Co.*, 134 F.2d 993, 995 (2d Cir. 1943) (L. Hand, J.).

This Court soon clarified that *Virginia Electric* was a constitutional ruling, characterizing its holding as a "recogni[tion] that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). It noted that, "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed." *Id.* at 537-38. However, "short of that limit the employer's freedom cannot be impaired." *Id.* at 538.

Shortly thereafter, the Board found another company to have committed unfair labor practices when it "injected itself into the then pending run-off election." *Matter of Clark Bros. Co., Inc.*, 70 N.L.R.B. 802, 803 (1946). Among other things, the Board found significant that the company conducted "an aggressive campaign against the CIO" that included "anti-CIO leaflets" and "paid advertisements hostile to the CIO." *Id.* In a lengthy dissent, Board member Gerard D. Reilly accused the majority of failing to comply with this Court's precedents.[3] *Id.* at 808-09 (Reilly, Member, dissenting). He detected "a disturbing tendency by the Board to

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3. Reilly helped draft the Taft-Hartley Act. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495, 542 (1993). His frustrations with the Board, as expressed in his *Clark Bros.* dissent, greatly informed the Act, which restrained the Board's discretion as much as it changed substantive law. *See* S. Rep. No. 80-105, at 23-24 (1947) (citing *Clark Bros.* as a decision that was "too restrictive" on employer speech), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 429-30 (1948).

return to its old line of decisions" by finding employer speech to be "part of a 'pattern of coercive conduct,' even in cases where it was clear that the offending speech was only coercive or 'inextricably intertwined' in the most highly metaphorical sense." *Id.* at 811. On appeal, the Second Circuit rejected the Board's reasoning on this point, stating that it was "now authoritatively settled that the constitutional guarantee of free speech entitles an employer to express his views on labor policies and to 'take sides' on issues involved in employee efforts to organize for collective bargaining, provided his conduct as a whole, including his utterances, is not coercive."[4] *N.L.R.B. v. Clark Bros. Co., Inc.*, 163 F.2d 373, 376 (2d Cir. 1947).

It was in this context that Congress debated and passed the Taft-Hartley Act, which amended the NLRA in various ways, including the addition of section 8(c). In addition to making various substantive legal changes, the Act reorganized the Board, which, as it made abundantly clear in the House and Senate committee reports, Congress viewed as insufficiently committed to following judicial precedents or otherwise complying with the law. *See, e.g.*, H.R. Rep. No. 80-245, at 6 (1947) (expressing intent that, "[u]nlike the old Board," the new Board "will not act as prosecutor, judge, and jury" and will "decide the cases, not according to prejudice and caprice, as the old Board so often has done, but according

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4. It nonetheless affirmed the Board's order on the narrower ground that, in the context of "an aggressive anti-union campaign," it was an unfair labor practice for the company to force employees to listen to an anti-union speech an hour before voting, "despite the generally unexceptionable character of the president's remarks." *Id.* at 376.

to the facts"), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 297 (1948) (hereinafter "*Legislative History*"). Accordingly, the Taft-Hartley Act codified certain judicial decisions that Congress believed the Board had ignored. *See, e.g., id.* at 27 (stating that "[i]n cases involving violence in strikes, the Board has seemed reluctant to follow the decisions of the courts," and so "[t]he committee has written into the act the rules that the courts and the Board itself have laid down"), *reprinted in* 1 *Legislative History*, at 318.

In this vein, Congress enacted section 8(c), not to provide employers with free-speech rights beyond those recognized by this Court's First Amendment jurisprudence, but to modify the Board's rules of evidence to ensure that the Board would not be tempted to evade judicial precedent by drawing unfounded and unreviewable factual inferences. "Although the old Labor Board protests it does not limit free speech," the House committee stated, "it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them." *Id.* at 8, *reprinted in* 1 *Legislative History*, at 299. For example,

> if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but 'infer,' from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay.

Id. at 33, *reprinted in* 1 *Legislative History*, at 324. Allowing the Board to rely on such inferences was especially problematic, the House observed in explaining

why it was changing other Board procedures, because the deferential standard of review of the Board's factual determinations "renders the courts all but powerless to correct the Board's abuses." *Id.* at 41, *reprinted in* 1 *Legislative History*, at 332. Accordingly, "[t]he bill provides that the new Board is prohibited from using as evidence against an employer, an employee, or a union any statement that by its own terms does not threaten force or economic reprisal." *Id.* at 8, *reprinted in* 1 *Legislative History*, at 299.

This approach to ensuring that the Board did not infringe upon employers' constitutional free-speech rights — barring the Board from considering certain evidence — was noted and criticized at the time of the Act's passage. The bill that emerged from the Senate contained no such evidentiary rule, *see* S. 1126 as reported, *reprinted in* 1 *Legislative History*, at 114, and the Senate committee explicitly disclaimed any intent to preclude the Board "from considering such statements as evidence," so long as the statements themselves were not considered unfair labor practices in contravention of judicial precedent, *see* S. Rep. No. 80-105 (1947), at 24, *reprinted in* 1 *Legislative History*, at 430. Several dissenting House committee members complained that the broad evidentiary rule went "far beyond mere protection of an admitted constitutional right." H.R. Rep. No. 80-245, at 84, *reprinted in* 1 *Legislative History*, at 375. Yet it was largely the House version of section 8(c) that was enacted into law. In adopting this version, the bill's conferees expressed their intent to end the Board's practice of "using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how

irrelevant or immaterial, that some later act of the employer had an illegal purpose." *See* H.R. Conf. Rep. No. 80-510, at 45 (1947), *reprinted in* 1 *Legislative History*, at 549.

Thus, the authoritative legislative history confirms what already is evident in the text of section 8(c): The provision does not create new substantive rights for employers, but rather creates procedural protections in Board proceedings.[5] These procedural protections, in turn, ensure that the Board, in adjudicating unfair labor practice allegations, does not infringe upon substantive rights of employers — *i.e.*, their constitutional free-speech rights — that preexisted the Act.

The United States portrays section 8(c) as granting a substantive right, but fails to grapple with any of this history. Rather, the United States relies solely on (1) the Senate Report's statement that the amendment "would insure both to employers and labor organizations full freedom to express their views to employees on labor matters" and (2) a stray floor statement by an individual senator, who opined that the bill made employers' speech rights "coextensive with the rights which labor unions enjoy." *See* Br. for United States at 3 (quoting S. Rep. No. 80-105, at 23, *reprinted in* 1 Legislative History, at 429); *id.* at 12 (same); *id.* at 15 (quoting 93 Cong. Rec. 4143 (1947) (statement of Sen. Ellender), *reprinted in*

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5. Although the Second Circuit mistakenly commented that if section 8(c) conferred no substantive rights it would be "a mere place-holder with no labor law function of its own," *Healthcare Ass'n*, 471 F.3d at 97, in fact, as the provision's drafters recognized, its procedural protections have considerable practical value to employers in proceedings before the Board.

2 *Legislative History*, at 1077). But because the Senate's version was not adopted by the conferees, those parts of the legislative history have questionable relevance to interpretation of the bill that was enacted. Moreover, legislative history cannot confer on employers a right appearing nowhere in the statutory text. *Cf. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 126 S. Ct. 2455, 2459 (2006). And even if the quoted comments could somehow be taken to inform the interpretation of the law that was enacted, they offer little support to petitioners' interpretation. Both statements are fully consistent with congressional intent to ensure that the Board did not infringe upon a pre-existing constitutional right rather than to create a new statutory right.

3. This Court's Precedents

Nor, finally, has this Court ever interpreted section 8(c) as conferring a substantive protection upon employers. To the contrary, it has made clear that any right employers may have to influence their employees' unionization decisions derives from the First Amendment. Meanwhile, it has correctly interpreted section 8(c) as a rule of evidence that requires that certain evidence be excluded in determining whether an unfair labor practice has been committed. *See, e.g., N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 410 n.3 (1964) (in keeping with section 8(c), Court put "no reliance [on] words of the respondent dissociated from its conduct").

Petitioners and their amici suggest otherwise by quoting selectively from *Linn*. That case held that section 8(c) does not preempt a state-law libel action stemming from speech regarding unionization, although false statements made in that context could form the basis of Board action, because the state courts and the Board would not "act at cross purposes."[6] 383 U.S. at 67. It "acknowledge[d] that the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management." *Id.* at 62. But it then pointed to the actual "wording of the statute," which made it "more likely that Congress adopted this section for a narrower purpose, *i.e.*, to prevent the Board from attributing anti-union motive to an employer on the basis of his statements." *Id.* at 62 n.5 (citing House Report). And this Court contrasted the text of section 8(c), which does not include rights-conferring language, with that of 29 U.S.C. § 411, which explicitly provides a "bill of rights" for employees. *Id.*

Nor can petitioners find support in *Linn*'s statement that "cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open,'" 383 U.S. at 62 (*quoting N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))(ellipses in *Linn*). *Linn* made it clear that this commitment to free speech — as well as the quotation in question — originated in the First Amendment doctrine and not, as petitioner

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6. To avoid any potential for conflict with Board adjudications, any libel cause of action stemming from speech regarding unionization must require a finding of actual malice, a standard similar to that adopted by the Board for unfair labor practices. *See* 383 U.S. at 64-65.

suggests, the labor law, *see* Pet. Br. at 21. And in characterizing *Linn* in a later case, this Court observed that the alleged violation of state law there did not "involve[] protected conduct" under the NLRA. *See Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 204 (1978).

Similarly, to the extent that *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), bears on this case, it is inconsistent with petitioners' interpretation that section 8(c) creates substantive rights for employers. In *Gissel*, this Court upheld a Board determination that certain statements made by an employer during a unionization drive, such as that unionization would likely lead to plant closures, constituted unfair labor practices. *Id.* at 616-20. It did not state that Congress "firmly established" an employer's right to speak, *see* Br. for United States at 13, but instead made it clear that such a right was established by the First Amendment. 395 U.S. at 617. Indeed, it stated that section 8(c) "merely implements the First Amendment" by keeping certain statements out of evidence. *Id.*

In short, the statutory right claimed by petitioners and their amici — the right of employers to communicate freely with employees for the purpose of influencing unionization decisions — is not found in the Unites States Code, the legislative history of section 8(c), or this Court's precedents. Thus, petitioners are simply mistaken in claiming that it is "indisputable" that direct regulation of employer speech regarding unionization would be preempted by the NLRA, *see* Pet. Br. at 14. The NLRA does not protect such speech. Any right of employers to speak in this context derives from the First Amendment, not the labor law, and so cannot form the basis of NLRA preemption.

B. State Laws Restricting Employer Influence Over Unionization Decisions Are Fully Consistent With Federal Policy.

Not only is there no federal law embodying the supposed federal policy of encouraging employer speech in the run-up to a unionization vote, but the federal government has many times attached to its grants and programs the same condition that California has attached here — *i.e.*, a requirement that an employer not spend government funds taking sides in union organization campaigns. Indeed, it has encouraged and even required the States to disburse money in this precise manner.[7]

In 1980, a House subcommittee, after extensive hearings regarding employer attempts to influence unionization decisions, declared that government money should not be spent on such activity. Such use of government money, it found, "violates the well established federal policy of neutrality on the issue of unionization." Subcomm. on Labor-Management Rel., Comm. on Educ. & Labor, U.S. House of Reps., *Pressures in Today's Workplace*, 96th Cong., at 41 (1980).

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7. That the federal government also attaches other conditions to its grants and programs does not distinguish these laws from California's, *see* Br. for United States at 20. California likewise attaches other conditions to many of its expenditures. *See, e.g.*, 11 Cal. Code Regs. § 463 (prohibiting funds from being used for variety of purposes); 27 Cal. Code Regs. § 10017(b) (barring use of funds for lobbying or "intervention in state or federal regulatory proceedings"); Cal. Gov't Code § 11015 (barring state funds from being spent on membership or participation in any organization whose membership practices are discriminatory).

Spending government money in such fashion is not only wasteful, but "flies in the face of the national labor policy 'to *encourage* the practice and procedure of collective bargaining' as articulated in the National Labor Relations Act." *Id.* The subcommittee "strongly encourage[d]" federal and state governmental entities alike to follow the lead of the Department of Health, Education and Welfare — which had recently clarified that Medicaid funds could not be used for this purpose — and "clearly and emphatically state that public funds earmarked for a particular use are not to be expended to influence workers about unionization," *id.* at 41. It stated its own intention to "pursue the issue of government contract money being used to underwrite an anti-union campaign." *Id.*

In the years since, Congress and the federal agencies have repeatedly followed the subcommittee's recommendation. For example, entities receiving federal Workforce Investment System ("WIS") money must provide the Secretary of Labor with "assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C. § 2931(b)(7). In particular, for States to receive WIS funds, they must establish procedures that allow them to adjudicate promptly violations of the WIS requirements, including the union organizing requirement. *Id.* § 2931(c)(1); *see* 70 Fed. Reg. 19,206, 19,218 (Apr. 12, 2005) (requiring participating State to "assure[]" that no funds will be used to "assist, promote, or deter union organizing").

Similarly, States are charged with administering National and Community Service grants, *see* 42 U.S.C. § 12638, money that may not be used to "assist, promote, or deter union organizing," *id.* § 12634(b)(1). Beneficiaries

of the Senior Community Service Employment Program, including States, also must ensure that such funds are not used for the same purposes. 20 C.F.R. § 641.839. The Department of Labor has noted that the latter regulation ensures that its policy is consistent with respect to these two programs. *See* Notice of Proposed Rulemaking, 68 Fed. Reg. 22,520, 22,537 (Apr. 28, 2003).

The federal government likewise requires that Head Start funds "shall not be used to assist, promote, or deter union organizing." 42 U.S.C. § 9839(f). The same restriction applies to federal Migrant and Seasonal Farmworker money. *See* 20 C.F.R. § 633.19(d). And the Medicare Act provides that, "[i]n determining reasonable costs" — *i.e.*, those for which a provider can receive reimbursement — "costs incurred for activities directly related to influencing employees respecting unionization may not be included." 42 U.S.C. § 1395x(v)(1)(N). This statutory provision restates the position of the Health Care Financing Administration, which had accomplished the same result by regulation. *See* Final Notice, 46 Fed. Reg. 3983 (Jan. 16, 1981). Similar conditions were attached in the 1980s to federal grants that no longer exist, such as block grants for implementing the Aid to Families with Dependent Children program. *See, e.g.*, Final Rule, 54 Fed. Reg. 42,146 (Oct. 13, 1989).

These federal laws cannot be dismissed as a product of particular statutes and a particular time (the 1990s), as petitioners contend, *see* Pet. Br. at 40-41 n.7. To the contrary, these laws have been enacted steadily since the 1980 subcommittee report.

Indeed, shortly before California passed the law in question here, the federal General Services Administration explicitly declared that denying government funding to influence unionization decisions is "in furtherance of the Government's long-standing policy to remain neutral with respect to employer-employee labor disputes."[8] *See* Proposed Rule, 64 Fed. Reg. 37,360, 37,360 (July 9, 1999). And the federal government as an employer has a longstanding policy of neutrality with respect to union organizing campaigns. *See Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 276-77 (1974). By contrast, the federal government has never — until now — claimed that it is federal policy that employers must be permitted to spend government funds to influence employees' unionization decisions.

Thus, in enacting the statute at issue in this case, California did no more than mimic the policy of the federal government. The federal government has spoken in a variety of ways — sometimes placing restrictions

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8. The agency made this statement in the course of promulgating regulations that, among other things, barred unionization-related expenses from allowable costs with respect to all government contracts. *See* Final Rule, 65 Fed. Reg. 80,256 (Dec. 20, 2000). It subsequently stayed the entire package of regulations, *see* Interim Rule, 66 Fed. Reg. 17,754 (Apr. 3, 2001), and then repealed them, *see* Final Rule, 66 Fed. Reg. 66,986 (Dec. 27, 2001). These later actions were largely based on concerns that a separate, controversial requirement that the federal government "black-list" contractors that failed to comply with various laws was "unworkable" in practice. *See id.* at 66,988. They contain no indication of any disagreement with the original statement that it is the federal government's policy not to fund employers' activities relating to unionization.

on the use of grant money, other times limiting the costs that can reimbursed — but its message has always been the same: employers may not use government funds to influence unionization decisions.[9] There is no basis for concluding that there exists a general federal policy of using government money to fund employers' attempts to influence unionization decisions, to which these restrictions are the "tailored exceptions," *see* Br. for United States at 19. To the contrary, every time the federal government has spoken in this area, it has consistently found that influencing unionization decisions is an inappropriate use of government funds. As the House subcommittee first stated and the General Services Administration reaffirmed two decades later, restricting such use of government funds is not the exception to the federal policy — it is the rule.

Of course, respondents need not establish the existence of a federal policy identical to the challenged California policy to defeat federal preemption. Rather, it is petitioners' burden to establish that there exists a contrary federal policy. That the federal government's actions have been consistent with California's for more than two decades strongly suggests that petitioners cannot meet that burden.

It is true, as petitioners note, that appropriations measures should not be construed so as to implicitly repeal or modify laws of general application. Pet. Br. at

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9. Petitioners contend that the form of the restriction is relevant to whether a State is regulating or acting as a market participant, *see* Pet. Br. at 36. They do not contend that it is relevant to whether a state law is substantively incompatible with federal policy.

40 n.7. But it is not amici States who contend that later Congresses have repealed or modified a free-speech right created by the NLRA. Rather, it is petitioners and their amici who ask this Court to find that Congress has repeatedly, and sub silentio, modified the workings of the NLRA with respect to a myriad of government programs. There is no indication that Congress has ever seen any such tension between its actions and the NLRA, further signifying that the supposed statutory right to use government money to influence unionization activities never existed. "The fact that Congress itself has thus imposed the same type of restriction . . . is surely evidence that Congress does not view such a restriction as incompatible with its labor policies." *De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (plurality opinion). That is particularly true here, where Congress's own actions are the *only* evidence of its intent in this regard, there being no statutory indicia of Congress's supposed determination "that robust employer speech enhances employee choice and contributes to fair elections," Br. for United States at 10.

Given the close fit and complementary relationship between federal policy and the California law at issue here (as well as the similar laws of other States),[10] there is no merit to petitioners' slippery-slope argument that upholding California's law "would allow for the balkanization of labor law in the United States, with

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10. Far from contending that the states have enacted diverging policies, petitioner concedes that every such state law enacted or considered so far is "materially identical," Pet. Br. at 55-56.

states free to pursue their own idiosyncratic labor policy goals," Pet. Br. at 16. No such balkanization is presented on the facts of this case. Instead, denying preemption would simply establish the straightforward proposition that States are entitled to attach the same labor-related conditions on the use of their funds that the federal government does on its own. Just as there is "no reason to believe that for this purpose [NLRA preemption] Congress intended state minimum labor standards to be treated differently from minimum federal standards," *Metro. Life Ins. Co.*, 471 U.S. at 755, so there is no reason to believe that Congress intended to disable States from putting the same conditions on the use of state funds that the federal government regularly puts on the use of federal funds.

C. *Machinists* and *Garmon* Do Not Apply Here, Because the State Law Neither Regulates an Area Meant To Remain Entirely Unregulated Nor Conflicts With Any Federal Policy.

Because there is no federal policy of encouraging employer speech regarding unionization, and because employer use of government funds to pay for speech has long been subject to extensive regulation, there is no rationale for federal preemption of the California statute at issue here.

1. *Machinists* Preemption

There is no basis for finding *Machinists* preemption, which prohibits "state and municipal regulation of areas that have been left 'to be controlled by the free play of economic forces.'" *Bldg. & Constr. Trades Council of the*

Metropolitan Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 225 (1993) (quoting *Machinists*, 427 U.S. at 140). The premise of *Machinists* preemption is that state regulation in an area of labor law that Congress deliberately left unregulated would upset the federal law's "intentional balance between the uncontrolled power of management and labor to further their respective interests." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986) (internal quotation marks omitted). Congress has made no such intentional decision to leave employers free to spend government funds to influence employees' unionization decisions.

Congress has not exempted noncoercive employer speech regarding unionization from "all government regulation," Pet. Br. at 22, but rather has simply declared that such speech cannot form the basis of an unfair labor practice. Meanwhile, it has repeatedly limited employers' ability to spend government funds in precisely the same manner as the California law, and has sometimes required the states to do the same in disbursing block grants. Even where those federal provisions do not apply, Congress requires the disclosure of certain employer expenditures on consultants for the purpose of influencing employees regarding unionization. *See* 29 U.S.C. § 433. And, as the United States concedes, the Board itself regulates employers' speech during union elections in several ways. *See* Br. for United States at 22.

Thus, rather than creating a no-regulation zone, Congress has extensively regulated in this area, including (but not limited to) imposing limitations on the

use of federal money that are analogous to the limitations on the use of state money challenged here. In addition, this Court already has upheld the application of state libel law to speech regarding unionization, *see Linn*, 383 U.S. at 63, a holding difficult to square with petitioners' claims that Congress has ousted states from *any* regulatory authority over this conduct, as *Machinists* requires.

Finally, the very premise of *Machinists* preemption — that Congress itself would have regulated this activity had it intended such regulation to be in place, and so allowing the States to regulate would upset the balance intentionally struck by Congress — is lacking here. That is because Congress has no authority to tell states how to distribute state funds, except in the context of joint federal-state funding programs. Thus, it cannot be said that Congress has deliberately left unregulated employers' ability to use state funds to discourage unionization.

2. *Garmon* Preemption

There similarly is no basis to apply *Garmon* preemption, under which state laws that may conflict with the federal labor law scheme are preempted. Such conflicts arise where "the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8." *Garmon*, 359 U.S. at 244. "Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." *Linn*, 383 U.S. at 60 (citation and internal quotation marks omitted).

Here, California's law does not substantively conflict with any federal rule of law, as no federal statute protects the covered activities or otherwise indicates a policy that would conflict with California's. Rather, "Congress has expressly addressed the question" multiple times of whether employers should be permitted to spend government money to influence unionization decisions, *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 544 (1979) (plurality opinion), and never has it suggested that an employers' right to do so was already protected "by an implicit federal rule of law," *id.* at 545. Nor does the NLRA prohibit the covered employer conduct. Rather, the conduct at issue is simply not "subject to Labor Board cognizance," *Linn*, 383 U.S. at 60, and so state regulation of it implicates no concerns warranting preemption.

There is no merit to petitioners' argument that the NLRA should be seen to "protect" employer speech simply because it does not "prohibit" it, *see* Pet. Br. at 24 n.2. Petitioners implicitly ask this Court to extend *Garmon* preemption beyond where Congress has affirmatively protected or prohibited certain conduct, *see, e.g., Wis. Dep't of Indus., Labor & Human Rels. v. Gould Inc.*, 475 U.S. 282, 286 (1986), to where Congress has not acted at all. This is a breathtaking expansion of *Garmon* doctrine, and one that would swallow the entire field of labor regulation. This expansion is evident from the Second Circuit's correct realization that it was applying *Garmon* so broadly that "the *Garmon* doctrine and the *Machinists* doctrine actually tend toward the same point." *Healthcare Ass'n*, 471 F.3d at 107. This finding — that the NLRA simultaneously regulates conduct in a way that conflicts with the California law

and intentionally leaves the same conduct entirely unregulated — collapses the conceptually distinct *Garmon* and *Machinists* doctrines. And it leaves no room at all for the States to regulate conduct that touches on labor relations, a conclusion that cannot be reconciled with this Court's precedents. *See, e.g., Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 289 (1971) ("We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States.").

Apparently recognizing this problem, the United States advances the much narrower claim that *Garmon* preempts only regulation of speech that is coercive in nature — *i.e.*, speech that the federal law actually prohibits.[11] *See* Br. for United States at 21. It claims, incorrectly, that the California law "compels state courts to usurp the functions of the Board" by incidentally regulating coercive speech as well as non-coercive speech, *see id.* at 24. But administration of the state law does not "interfere[] with the Board's ability to adjudicate controversies committed to it by the Act," *Metro. Life Ins. Co.*, 471 U.S. at 748 n.26, because the state law does not require any determination, such as whether speech is coercive or non-coercive, that would otherwise be made by the Board.

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11. The United States appears to disclaim any argument that the NLRA actually protects employer speech. *See* Br. for United States at 26.

This Court has never endorsed the United States' novel theory that state law cannot regulate any conduct that also is regulated by federal labor law, even where such regulation occurs, as the United States concedes, "on a different axis." Br. for United States at 24. To the contrary, it has recognized that "[c]onsiderations of federal supremacy" are less important when states regulate conduct that is also prohibited by the NLRA than when states regulate NLRA-protected conduct. *Sears*, 436 U.S. at 200; *see also Linn*, 383 U.S. at 66 (no federal conflict arises merely because "the Board and state law frown upon" the same conduct "for different reasons"). Accordingly, state regulation of conduct prohibited by the NLRA is preempted only where such regulation serves "as a means of enforcing the NLRA" itself, *Gould*, 475 U.S. at 286, and thus endangers "uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress," *N.Y. Tel. Co.*, 440 U.S. at 528. But state regulation that only incidentally touches upon conduct that is also regulated by the NLRA implicates none of the concerns articulated by *Garmon*, and so is not preempted, where the state inquiry has no overlap with the federal inquiry and so interferes not at all with the Board's unfair labor practices jurisdiction. This Court therefore has declined to find state law preempted where "the respective controversies presented to the state and federal forums would not have been the same." *Sears*, 436 U.S. at 196-97.

In *Sears*, for example, this Court declined to preempt an employer's state-law trespass claim against a union that was picketing the employer's property,

notwithstanding that the picketing was arguably either prohibited or protected by the NLRA. It reasoned that any claim by the employer that the picketing was prohibited would turn on "whether the picketing had a recognitional or work-reassignment objective," whereas the trespass claim turned on "the location of the picketing" and would not take into account "whether the picketing had an objective proscribed by federal law." *Id.* at 198. Moreover, there was no means by which any dispute over whether the picketing was protected by the Act could be presented to the Board, and so "the primary-jurisdiction rationale does not provide a sufficient justification for pre-empting state jurisdiction." *Id.* at 202 (emphasis omitted).

On its face, California's law does not ask whether employer expression is coercive — the question that would concern the Board — and so there is no obvious risk that the Board and a California court would reach inconsistent results. Straining nonetheless to find an overlap between the state-law inquiry and the federal-law inquiry, the United States argues that a state court applying California's law would first have to ascertain whether the employer activity at issue was coercive, because regulation of non-coercive speech is preempted pursuant to the *Machinists* doctrine. *See* Br. for United States at 25. In effect, the United States asks this Court, in the guise of applying *Machinists*, to rewrite California's law to ban only conduct already banned by the NLRA and to require the same inquiry by the state courts that would be made by the Board, at which point the law would be preempted by *Garmon*. But because

Machinists does not apply, *see supra* Section C.1, the premise of the United States' argument is mistaken.[12]

California's law is tailored to complement, rather than conflict with, federal policy. Substantively, it is no more than a state analog to the federal policy of not funding speech intended to influence unionization decisions. Procedurally, it is no threat to uniform enforcement of any federal policy, because it requires a state court to ask none of the same questions that would concern the Board. There is no reason to apply *Garmon* preemption here.

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12. Moreover, state laws of broader application may not be judicially rewritten in a way that requires state courts to inquire into whether the NLRA would apply, for that "would invite precisely the harms that the pre-emption doctrine is designed to avoid." *N.Y. Tel. Co.*, 440 U.S. at 529 n.15.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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February 19, 2008

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